No. 87-545

IN THE

Supreme Court of the United States

October Term, 1987

CESAR A. PERALES, as Commissioner of the New York State Department of Social Services,

Petitioner,

– against –

MILDRED KRIEGER,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITIONER'S REPLY MEMORANDUM

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PRELIMINARY STATEMENT

The Court should grant review because respondent has not rebutted petitioner's showing that the petition presents important, novel federal issues involving the administration of the medicaid program or that the New York Court of Appeals' rulings concerning §§ 552–553 of the Administrative Procedure Act (A.P.A.), 5 U.S.C. (1982), conflict with the weight of federal authority construing that Act.

Respondent has indeed not even addressed the central substantive issues in this case—(1) whether 42 U.S.C. § 1396d(a), which requires payment to providers unless the state plan provides otherwise, admits of an unstated exception for bills paid by new applicants during the three months prior to application; and (2) whether 42 U.S.C. § 1396a(a)(10)(B)(i), which requires states to make medicaid available to eligible persons on an equal basis, is satisfied by the payment to all providers on the same basis for all eligible patients' qualifying expenses, and by the refusal to pay patients directly for any bills, whether incurred before or after the date of application (except in cases of agency delay or error, in which event all patients are reimbursed on the same basis). (Petition [Pet.] 2–3, 6–8).

Respondent seeks to expand the specific, narrowly drafted, regulatory exemption requiring direct payments in agency error or delay cases to create a new benefit for which there is no authority. (Brief in Opposition [Opp.] 17–19). She has cited no legislative history indicating an intent to make such inroads on the states' statutory right not to make direct payments.

Her arguments as to why this Court should not grant certiorari are unpersuasive.

A. Respondent has failed to demonstrate that the decision below rests upon an independent and adequate state law ground.

When a state court decision rests primarily on federal law, or is interwoven with federal law and "the adequacy and independence of any possible state law ground is not clear from the face of the opinion", this Court has jurisdiction to review the decision. *Michigan* v. *Long*, 463 U.S. 1032, 1040–1041 (1983). Here, the state court did not make clear that its holding was based on an adequate and independent state ground; to the contrary, a

straightforward reading of the opinion demonstrates that it rests inextricably on federal grounds.

Although the court cited a state statute and regulation, N.Y. Soc. Serv. Law (S.S.L.) § 367-a(1) and 18 N.Y.C.R.R. § 360.17(a)(4), and three state court cases, in demonstrating that under state law, payments may be made to recipients in cases of delay and agency error (Pet. 6a–7a), its only support for the conclusion that this may, by parity of reasoning, be extended to require direct payment to recipients for all medicaid assistance provided within three months prior to application is found in the following language:

> Support for this conclusion may be found in the requirements of 42 USC § 1396a(a)(10)(B) and 18 NYCRR 360.16(c) that equal benefits be made available to applicants and that such benefits be made available to applicants in the three-month preapplication period. To hold otherwise would lead to the creation of two classes of Medicaid recipients, one of which would receive fewer benefits solely because the members of the class paid their medical bills promptly, and the other which would receive greater benefits by way of reimbursement to the providers of medical services because the members of the class did not pay their medical bills promptly.

The regulation cited in the quoted language, 18 N.Y.C.R.R. § 360.16(c), simply requires that benefits be made available for medical services provided during the three months prior to application, a requirement based directly on federal law. 42 U.S.C. § 1396a(a)(34); 42 C.F.R. § 435.914(a). The *sole* provision that the court cited to support its conclusion that these benefits may be paid directly to recipients—in cases not involving agency error or delay—was 42 U.S.C. § 1396a(a)(10)(B), the equal benefits

provision of the medicaid statute. It is thus clear that the court's holding rests solely upon federal law.*

As further support for her contention that the Court of Appeals based its decision on state law, respondent alleges that the state has adopted a medicaid program that is more generous than the federal one and that it has assumed the cost without federal reimbursement. (Opp. 12). The decision below, however, clearly assumes that the respondent's expenses will be covered under the joint federal-state-local government medicaid program. (Pet. 6a-7a). Respondent never raised her state-only medicaid claim in the state courts, and it is directly contrary to her claim of federal entitlement. (Opp. 17-19).

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* The extensive discussion below of why the letter from the United States Department of Health and Human Services (H.H.S.), setting forth its interpretation of the federal provisions, was not entitled to deference, further demonstrates that the state court consciously decided the case on federal grounds. (*See* Pet. 8a-9a).

Respondent's contention that petitioner has conceded the invalidity of the letter under A.P.A. § 552 (Opp. 14) is incorrect. Petitioner's second question separately challenging the ruling below concerning publication of the H.H.S. letter was, in effect, surplusage. Petitioner's first question places in issue the propriety of the Court of Appeals' ruling in light of "the state and federal agencies' interpret[ation of] the federal statutory scheme to bar payments to recipients." (Pet. i). Point I in support of Question 1 argues that the H.H.S. letter "was entitled to substantial deference." (Pet. 7). Question 1 thus "fairly includes", Sup. Ct. R. 20.1, petitioner's challenge to the state court's refusal to consider the H.H.S. letter because it had not been published pursuant to §§ 552-553 of the A.P.A.

In fact, four of the twelve cases petitioner cites (Pet. 11-12) to show the conflict between the decision below and federal appellate rulings relied exclusively on § 552. *Donovan* v. *Wollaston Alloys, Inc.*, 695 F.2d 1, 9 (1st Cir. 1982); *United States* v. *Fitch Oil Co.*, 676 F.2d 673, 678 (Temp. Emerg. Ct. App. 1982); *Anderson* v. *Butz*, 550 F.2d 459, 463 (9th Cir. 1977); *Hogg* v. *United States*, 428 F.2d 274, 280 (6th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). Two others ruled on both § 552 and § 553. *State of New York* v. *Lyng*, 829 F.2d 346, 353-4 (2d Cir. 1987); *Cubanski* v. *Heckler*, 781 F.2d 1421, 1427-29 (9th Cir. 1986), *cert. granted sub nom. Bowen* v. *Kizer*, 107 S. Ct. 1282 (1987).

B. Petitioner has present interests in recovering the funds paid to respondent by the local district, and in either resisting the local district's claim for reimbursement or establishing its own claim against the federal agency. It is irrelevant to the Court's jurisdiction that the local agency paid respondent and did not itself seek certiorari.

Should this Court reverse the judgment below, petitioner, as the single state agency supervising the medicaid program in New York, must direct the City Commissioner of Social Services (local district) to recover from respondent, as an overpayment of medical assistance, the funds paid under the judgment.* 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10; S.S.L. §§ 104-b, 363-a (1), 369(1); *Florence Nightingale Nursing Home* v. *Blum*, 570 F. Supp. 285, 289 (S.D.N.Y. 1983); *Beaudoin* v. *Toia*, 45 N.Y.2d 343 (1978). There thus is a live controversy between respondent and petitioner.

Even if the funds that the local district paid respondent could not be recovered, petitioner has an independent financial interest in obtaining review. In New York, the state agency and local districts share equally in the cost of medical assistance not paid by the federal government. S.S.L. § 368-a; *Toia* v. *Regan*, 54 A.D.2d 46, *aff'd*, 40 N.Y.2d. 837, *app. dismissed*, 429 U.S. 1082 (1977). A reversal in petitioner's favor will allow him to recover from the local district the state share of the local district's payment to respondent. *See* n. "*" *supra*. Even an affirmance on the merits would establish the state's own entitlement to reimbursement from the federal government.

The local district's failure to appeal and to apply for certiorari does not divest this Court of jurisdiction to review the judgment of the Court of Appeals since petitioner has independent interests in seeking a reversal. *Compare City National Bank of Fort Worth* v. *Hunter*, 129 U.S. 557, 578-9 (1889); *The Maria Martin*, 12 Wall (79 U.S.) 31, 43 (1870); *Cover* v. *Cohen*, 61 N.Y.2d261, 277-8 (1984), *with Diamond* v. *Charles*, 106 S. Ct.

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* Respondent's argument that the local district has an independent obligation under state law to pay her entirely from its own funds comes too late as respondent has until now raised her claims under the joint federal-state-local medicaid program. As part of that program, the local district may seek reimbursement from petitioner for the federal and state shares of the monies. S.S.L § 368-a. The local district has in fact indicated its intention to seek such reimbursement from petitioner.

1697, 1703-4 (1986). Indeed, the local district was merely a formal party to the proceedings below, as it would have been here. *Patterson* v. *Blum*, 86 A.D.2d 893 (2d Dep't 1982) (local district not necessary party in proceeding to enforce state agency fair hearing decision); *Unger* v. *Blum*, 117 A.D.2d 607 (2d Dep't 1986) (state agency solely liable for attorney's fees under 42 U.S.C. 1988).*

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
December 7, 1987

Respectfully submitted,

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* Respondent's suggestion that the local district acquiesced in the trial court's judgment (Opp. 2, 8) is incorrect. The local district paid respondent only after the petition was filed herein and a statutory stay on payment pursuant to New York Civil Practice Law and Rules § 5519(a)(1) had dissolved. Furthermore, the presence of the local district was necessary only for payment of benefits and not to defend petitioner's fair hearing decision. *Patterson* v. *Blum*, *supra*. Petitioner is aware of no case in which a local district that did not appeal has been denied the benefit of an appellate ruling reversing the annulment of a decision after fair hearing. *Cf. Cover* v. *Cohen*, *supra*.